J. G. CRYAN v. BOARD OF GOVERNORS OF THE REGISTERED DENTISTS OF OKLAHOMA
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No. 81-630
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Petition

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No. 81-630

In The Supreme Court Of The United States

OCTOBER TERM, 1981

J.G. CRYAN, d/b/a DENTURIST-DENTURE LAB.

Petitioners

VERSUS

BOARD OF GOVERNORS OF THE REGISTERED DENTISTS OF OKLAHOMA,

Respondents.

PETITION FOR WRIT OF CERTIORARI
Requesting Petition to the Supreme Court of Oklahoma

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ISSUES PRESENTED

1. Whether the contempt set forth in OKLA. STAT. tit. 59 §328.49 (1971) as a civil contempt, is in fact a criminal contempt by the establishment of a mandatory requirement of fine and imprisonment.

2. Whether the improper characterization of the contempt as civil deprived petitioner of due process by misapprising him of the nature of the charges against him and caused him to: a) testify against himself in an effort to prove the "purge" of the civil contempt which was used against him by both the court of the first instance and the Oklahoma Supreme Court to prove his guilt, in violation of his Fifth Amendment privilege, and b) and caused an uninformed waiver of the right to trial by jury.

By the characterization of OKLA. STAT. tit. 59, §328.49 (1971) as civil rather than criminal, Petitioner was wrongfully denied the

full panoply of federal constitutional rights guaranteed to every person charged with a crime and specifically impairing his Fifth, Sixth and Fourteenth Amendments rights under the United States Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

J.G. Cryan, d/b/a DENTURISTS-DENTURE LAB, Petitioner,

vs.

BOARD OF GOVERNORS OF THE REGISTERED DENTISTS OF OKLAHOMA, Respondent.

PETITION FOR WRIT OF CERTIORARI

COMES NOW J.G. Cryan, petitioner in the above styled cause, by and through his attorney, Mark Edgar Hammons, and submits this Petition for Writ of Certiorari pursuant to Rule 17 of the United States Supreme Court, 28 U.S.C.

I
ISSUES PRESENTED

1. Whether the contempt set forth in OKLA. STAT. tit. 59 §328.49 (1971) as a civil contempt, is in fact a criminal contempt by the establishment of a mandatory requirement of fine and imprisonment.

2. Whether the improper

characterization of the contempt as civil deprived petitioner of due process by misapprising him of the nature of the charges against him and caused him to: a) testify against himself in an effort to prove the "purge" of the civil contempt which was used against him by both the court of the first instance and the Oklahoma Supreme Court to prove his guilt, in violation of his Fifth Amendment privilege, and b) and caused an uninformed waiver of the right to trial by jury.

By the characterization of OKLA. STAT. tit. 59, §328.49 (1971) as civil rather than criminal, Petitioner was wrongfully denied the full panoply of federal constitutional rights guaranteed to every person charged with a crime and specifically impairing his Fifth, Sixth and Fourteenth Amendments rights under the United States Constitution.

II
PARTIES

The Parties in the lower court action

were the Board of Governors of the Registered Dentists of Oklahoma, a statutorily created agency of the State of Oklahoma under OKLA. STAT. tit 59, §328.4 et seq (1971); and J.G. Cryan, an individual.

III
RULINGS

The official report of the opinion challenged herein is Board of Governors of the Registered Dentists of Oklahoma -v- J.G. Cryan, ____ P2d __, 52 O.B.A.J. 1026 (Okla. April 28, 1981). There were no administrative proceedings or rulings made in this case.

IV
JURISDICTION

Petitioner, Mr. J.G. Cryan, hereinafter referred to as Mr. Cryan, seeks review by way of a Petition for Writ of Certiorari from a decision of the Oklahoma Supreme Court pursuant to Rule 17 of the Rules of the United States Supreme Court, 28 U.S.C. On the 28th day of April, 1981, the aforesaid Court rendered its unpublished opinion, Board of Governors vs

Cryan, supra, affirming the judgment and fine rendered by the District Court of Tulsa County, State of Oklahoma. On June 22nd, 1981, the Petition for Rehearing was denied without opinion. A Notice of Intent was filed with the Oklahoma Supreme Court along with a Motion for Stay. The stay was granted until final disposition by this Court.

V
CONSTITUTIONAL PROVISIONS AND APPLICABLE STATUTES

This case involves: the Fifth Amendment to the United States Constitution which provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process

of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution which provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution which provides:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The OKLA. CONST art. II §20 which states:

"In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed: Provided, that the venue may be changed to some other county of the State, on the application of the accused, in such manner as may be prescribed by law. He shall be informed of the nature and cause of the accusation against him and have a copy thereof, and be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his behalf. He shall have the right to be heard by himself and counsel; and in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of the witnesses that will be called in chief, to prove the allegations of the

indictment or information, together with their post office addresses."

The OKLA. CONST. art II §25 provides:

"...that any person accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such any order of injunction or restraint, made or entered by any court or judge of the State shall, before penalty is imposed, be entitled to a trial by jury as to guilt or innocence..."

The OKLA STAT. tit 59, §328.49 (1971) which states:

"...In addition to any other penalties provided herein, any person found guilty of contempt of court by reason of the violation of any order or judgment of injunction prohibiting the unlicensed practice of dentistry now in effect or hereafter entered pursuant to any provision of this act, shall be punished by imprisonment in the county jail for a minimum time of not less than thirty (30) days or a maximum of not more than one (1) year and by a fine of not less than Five Hundred Dollars ($500.00)."

The OKLA STAT. tit 21, §3 (1971) which states:

> "A crime or public offense is an act or omission forbidden by law, and to which is annexed, upon conviction, either of the following punishments: 1. Death; 2. Imprisonment; 3. Fine; 4. Removal from office; or, 5. Disqualification to hold and enjoy any office of honor, trust, "or profit, under this State."

The OKLA STAT. tit 19, §215.4 (1971) which states:

> "The District Attorney or his assistants shall appear in all trial courts and prosecute all actions for crime committed in his district, whether the venue is changed or not; and he shall prosecute or defend in all courts, state and federal, in any county in this State, all civil actions or proceedings in which any county in his district is interested, or a party. The District Attorney may at all times request the assistance of District Attorneys or Assistant District Attorneys from other districts who then may appear and assist in the prosecution of actions for crime in like manner as

assistants in the district."

VI
STATEMENT OF CASE

This case came on for a non-jury bifurcated trial on the 11th day of July, 1978, in the District Court of Tulsa County, State of Oklahoma. The first day of the trial supposedly dealt with the guilt or innocence of Mr. Cryan and the second day after the court found him guilty testimony was heard to determine the sentence.

The statute under which Mr. Cryan was tried, OKLA. STAT. tit 59, §329.49 (1971), established a minimum sentence of thirty (30) days imprisonment in the county jail as well as a minimum fine of $500.00 dollars with no maximum fine and a separate penal bond of $1,000.00 minimum to insure future compliance to be required at the discretion of the trial court. The sentence imposed was thirty (30) days in the county jail and a fine of $500.00 dollars.

A direct appeal from that ruling was lodged in the Supreme Court of the State of Oklahoma, Case No. 52,579 styled The Board of Governors of the Registered Dentists of Oklahoma v J.G. Cryan, supra. The Supreme Court of Oklahoma affirmed the sentence by a five to four vote on April 28, 1981, with a rousing dissent. Rehearing was denied on June 21, 1981.

VII
STATEMENT OF FACTS

The relevant facts pertaining to the issues presented in the case at bar indicate that this matter came on for non-jury trial. The Plaintiff, Board of Governors of the Registered Dentists of Oklahoma, a State agency, prosecuted this case by and through its privately retained counsel instead of the State prosecutors as is required for all criminal proceedings within the State of Oklahoma, pursuant to OKLA. STAT. tit 19, §215.4 (1971). At the outset of the proceedings Mr. Cryan's

trial attorney presented the argument that OKLA. STAT tit 59, §328.49 (1971), entitled him to a jury trial pursuant to the 6th Amendment of the United States Constitution and OKLA. CONS. art II, §20, due to the criminal nature of the statute, in the demurrer and plea to jurisdiction, which was overruled. At that point Mr. Cryan waived his right to jury trial and proceeded. Given the rulings of the trial court the waiver of his constitutional right to jury trial was an uninformed waiver which shall be addressed more fully later.

Testimony was given by two (2) witnesses for the Board relating violations of the Oklahoma Dental Act, OKLA.STAT. tit 59, §328.49 (1971), practicing dentistry without a license, with the last violation occurring approximately five (5) months prior to the trial of Mr. Cryan.

Thereupon, the trial court found Mr. Cryan guilty of practicing dentistry without a license. The trial court, in the second half

of the trial, heard from Mr. Cryan who admitted his complicity in the crime, in contravention of his Fifth Amendment right. The expressly stated reason for the testimony of Mr. Cryan was to present the affirmative defense of current compliance and remorse.

After the presentation of evidence, the trial court imposed a sentence of thirty (30) days in the county jail and assessed a fine of $500.00.

VII
ARGUMENT AND AUTHORITY

PROPOSITION I

The contempt provision of OKLA. STAT. tit 59 §328.49 (1971) has both civil and criminal elements and therefore, the criminal elements dominate transforming the statute into a criminal statute.

OKLA. STAT. tit 59, §328.49 provides:

> "Any person, firm or corporation who shall practice or attempt to

practice dentistry or dental hygiene within the State of Oklahoma, after his license or certificate of ability, respectively, shall have been revoked, or while under suspension, as herein provided, or without having complied with the provisions of this act shall be guilty of a misdemeanor, and upon conviction shall be punishable by a fine of not less than One Hundred Dollars ($100.00), and not exceeding Five Hundred Dollars ($500.00), or by imprisonment in the county jail not less than thirty (30) days nor exceeding one (1) year or by both such fine and imprisonment. Each day of such violation shall be a separate offense. The writ of injunction, without bond, is also made available to the Board of Governors for the enforcement of this act. Any person who shall practice dentistry or dental hygiene or conduct the business of a dental laboratory in this state within the meaning of this act without having first obtained a license, certificate of ability, or permit, respectively, from the Board of Governors, or who violates any of the provisions of this act, the penalty for which is not herein specifically provided, shall be deemed guilty of a misdemeanor. Anyone

convicted of such misdemeanor under this act shall be punished by a fine of not less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1,000.00) or by imprisonment in the county jail for not less than thirty (30) days nor more than twelve (12) months, or both such fine and imprisonment, in the discretion of the court. Each day of such violation shall be a separate offense. The writ of injunction, without bond, is also made available to the Board of Governors for the enforcement of this act. Any person, firm, or corporation found guilty of a second and subsequent offense under the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction therefor shall be punished by imprisonment in the county jail for a period of not less than sixty (60) days, and a fine of not less than Five Hundred Dollars ($500.00), and not exceeding One Thousand Five Hundred Dollars ($1,500.00), and shall have his license, certificate of ability, or permit, respectively, revoked for a period of five (5) years by the Board of Governors of the Registered Dentist of Oklahoma. Each day of violation shall be a separate offense. In

addition to any other penalties provided herein, any person found guilty of contempt of court by reason of the violation of any order or judgment of injunction prohibiting the unlicensed practice of dentistry now in effect or hereafter entered pursuant to any provision of this act, shall be punished by imprisonment in the county jail for a minimum time of not less than thirty (30) days or a maximum of not more than one (1) year and by a fine of not less than Five Hundred Dollars ($500.00); and in addition, the court may require defendant to furnish a good and sufficient bond in a penal sum to be set by the court, not less than One Thousand Dollars ($1,000.00), (Emphasis added) which shall be conditioned upon future compliance in all particulars with the order or injunction entered, and in the event of failure of defendant to furnish such bond when so ordered, he shall be confined in the county jail pending his compliances therewith. Such bond shall be mandatory as to any person hereafter found guilty of a second contempt of court for violation of any such order or judgment of injunction entered pursuant to this act, or any prior dental act.

This statute sets forth procedures for first time violations and second and subsequent violations. The first time violators may be subject either to a civil injunction or a misdemeanor conviction. In the case at bar, Mr. Cryan had had a civil injunction entered against him and the action complained of the contempt proceeding occurred upon his second offense. Because the contempt proceeding arose out of a violation of a civil injunction, the trial court, after hearing argument at the outset of the proceedings ruled:

> "So, we'll proceed in the nature of a civil contempt, indirect, and then we'll consider the propriety, if it ever gets to that point, the necessity of a sentence, that sentence and punishment statute that was passed by the legislature, again, whether or not that is proper in light of the common law and the statutory constitutional law dealing with contempt, so I"ll take your motion and overrule it at this time . . . . The question, then, of the propriety of the statute that you are concerned about, the

> punishment statute, we can address, if necessary, later on." (TR. 11)

The trial court in its finding of guilt held the statute to be a "civil indirect contempt" and stated further:

> "I might add that I don't think the fact that you have a penalty that's in a penal nature will change the complexion of the proceeding..." (TR. 52).

The Supreme Court of Oklahoma majority opinion agreed with the trial court's ruling that this was an indirect civil contempt with criminal elements. A copy of both the majority and dissenting opinions are attached for this Court's convenience. The majority opinion states that OKLA. CONST. art II §25 contains no prohibition against a punitive sentence for violation of a court injunction. A civil contempt action which imposes a criminal sentence, as was done in this case, is

constitutionally impermissible. See Shillitani vs. United States, 384 U.S. 364 (1966); and Colombo vs. New York, 405 U.S. 9 (1972). The imposition of a sentence for a definite or minimum term is a criminal contempt regardless of how the trial court perceives the sentence. See Yates vs. United States, 355 U.S. 66 at 72 (1975).

Although the majority opinion is correct in its understanding of the Oklahoma Constitutional provision above, the distinction which causes this to be a criminal statute and not a punitive sentence for an indirect civil contempt is the fact of a minimum sentence. The nature of a civil contempt is to coerce cooperation or to cause the contemptor himself to purge himself of the contempt and punishment may be avoided by compliance with the Court's order. The Oklahoma Legislature has taken this contempt out of the realm of civil contempt and made it a crime. Statutes defining public offenses are by their own

definition criminal not civil in nature. OKLA. STAT. tit. 21, §3 (1971) provides:

> "A crime or public offense is an act or omission forbidden by law, and to which is annexed to law, upon conviction, either of the final punishments:
>
> 1. Death;
> 2. Imprisonment;
> 3. Fine;
> 4. Removal from office;
>
> or,
>
> 5. Disqualification to hold and enjoy any office of honor, trust, or profit, under this State."

The majority opinion errs in classifying contempts as sui generis. Black's Law Dictionary Revised Fourth Edition defines sui generis as meaning "of its own kind or class; i.e., the only one of its own kind; peculiar." In ruling that contempt was now sui generis the Supreme Court of Oklahoma changed the time honored tradition in Oklahoma that contempts were either civil or criminal in nature. The highest criminal court in the State of Oklahoma, the Oklahoma Court of Criminal Appeals in Roselle vs. State, 503

P2d 1293 (Okla. Crim 1972) specifically stated that criminal contempt is a misdemeanor rejecting the notion of contempt as a sui generis offense partaking of both civil and criminal aspects.

An analysis of one's constitutional liberties is not helped by the characterization of contempt as sui generis. For this reason this Honorable Court has affirmed the traditional distinction between civil and criminal contempts for the purpose of determining the nature of constitutional guarantees possessed by the accused. One's constitutional liberties do not depend upon the form or designation of a proceeding as civil or criminal, but rather upon punishment to be imposed. This Honorable Court stated the test for distinguishing between criminal and civil contempt in Nye vs. United States, 313 U.S.33 (1941),42-43,

> "We recently stated in McCrone vs. United States, 307 U.S.61, 64, "'While particular acts do not always

> readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purpose of the complaintant, and is not intended as a deterrent to offenses against the public...'"

As Justice Brandeis stated in Union Tool Company vs. Wilson, 259 U.S. 107, 110,

> "'Where a fine is imposed partly as compensation to the complaintant and partly as punishment, the criminal feature is dominant and fixes its character for the purposes of review.'"

This test is substantially the same as the common law test and has been the one previously applied by the courts of the State of Oklahoma. By labeling the contempt as sui generis the Oklahoma State Supreme Court ignores the fact that if the offense contains criminal elements those criminal elements dominate and the accused has all rights guaranteed a criminal defendant attendant to any criminal proceeding.

The Supreme Court of Oklahoma in its majority opinion stated that it could not assume that the trial judge erred in issuing judgment which "contain aspects of criminal contempt of a criminal contempt sentence." The Supreme Court of Oklahoma further argues that although that in most civil contempts the compliance with the Court's order would normally be sufficient to allow the contemptor to be released immediately in the case at bar a minimum punishment must be required because,

> "The very presence of the contemptor in Court/or in the ante-room of the facility would guarantee that he was not at that moment in violation of the injunction. If the Court's sentence for contempt could not incarcerate the contemptor unless he was then in violation there would be no enforcement of the order." 52 O.B.A.J. at 1026,1028.

Therefore the dissenting justices were correct in their statement that for this "non-prosecution" of this "non-crime" there would never be a defense.

PROPOSITION II

WHETHER THE IMPROPER CHARACTERIZATION OF THE CONTEMPT AS CIVIL DENIED MR. CRYAN THE FULL PANOPLY OF FEDERAL CONSTITUTIONAL RIGHTS GUARANTEED TO EVERY PERSON CHARGED WITH A CRIME.

Contiguous with any criminal proceeding are the rights guaranteed by the Federal Constitution pursuant to the Fifth Amendment, Sixth Amendment and the Fourteenth Amendment of the United States. This Honorable Court in Bloom vs. Illinois, 391 U.S. 194 (1968) abandoned the fiction of contempt as sui generis in favor of a more pragmatic and realistic appraisal and in doing so, held that the constitutional right to a jury trial applied to actions for contempt as well as the full panoply of rights guaranteed under the Bill of Rights. In Bloom, supra, this Court stated:

> "Criminal contempt is crime in the ordinary sense; it is

a violation of the law, a public wrong which is punishable by fine or imprisonment or both. In the words of Justice Holmes: "' These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristics of crimes as that word has been understood in English speech. Gompers vs. United States, 233 U.S. 604, 610 (1914).'"

"Criminally contemptuous conduct may violate other provisions of the criminal law; but even when this is not the case convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical -- protection of the institutions of our government and enforcement of their mandates." 391 U.S. 201. See also Gompers vs. Bucks Stove and Range Co., 221 U.S. 418 at 444 (1911).

There must also be a full and timely notice of the charges, a fair opportunity to meet them, the right to assistance of counsel,

and the right to call and confront witnesses all guaranteed by the Sixth Amendment of the Constitution of the United States. See Cooke vs. United States, 257 U.S. 517, at 537 (1925). The contemptor is guaranteed a public trial before an unbiased judge and is subject to pardon or to the defense of the statute of limitations. See the discussion in Bloom, supra at 201-206.

In the case at bar, Mr. Cryan after presenting his argument that this was a criminal and not a civil action to the trial court and having that overruled by the court, waived his right to jury trial. Any constitutionally guaranteed right such as the right to a trial by jury for all criminal defendants must be waived with full knowledge of all surrounding facts. In as much as Mr. Cryan was advised that this was a civil contempt and had been advised by his attorney, rightfully so, that he had a defense of current compliance, and since Mr. Cryan belabored under

the mistaken belief that he could thereby avoid incarceration his waiver was not a knowledgeable or intelligent one. Nor was his waiver or his Fifth Amendment right to not be compelled to be a witness against himself. Although Mr. Cryan's testimony came in the bifurcated proceeding after the trial court had found him guilty of contempt, the Supreme Court of Oklahoma made it quite clear that his testimony was used in determining his guilt,

> "Additionally, however, that case makes the point that an incorrect charge to the jury of the burden of proof will be the lesser standard will not suffice to overturn a judgment of contempt when the evidence of <u>the defendant</u> discloses guilt. In this proceeding there is absolutely no evidence which would support a finding that Mr. Cryan did not violate the injunction,...."

In any criminal trial the standard of proof is beyond a reasonable doubt, however, in this "non-prosecution" of a "non-crime" the trial court used the lesser standard of the

preponderance of the evidence. The Supreme Court of Oklahoma in addressing that issue stated that the standard applied, the preponderance of the evidence, was not reversible error inasmuch as there was sufficient evidence to support the guilty verdict under the higher standard, beyond a reasonable doubt, if Mr. Cryan's testimony was considered. This would be a direct violation of Mr. Cryan's right to not be compelled to testify against himself and should not be used to bootstrap an impermissible proceeding in violation of his constitutional rights. Prior to the ruling against Mr. Cryan in this case, the Supreme Court of Oklahoma had always applied the "clear and convincing" standard of proof rather than the lesser "preponderance of the evidence" standard in all indirect civil contempt proceedings. See Whillock vs. Whillock, 550 P2d 558 (Okla. 1976); and Clark vs. Most Worshipful St. John's Grand Lodge of Ancient Free and Accepted Masons of Okl., 198

Okla. 621, 181 P2d 229 (Okla. 1947).

CONCLUSION

By the actions of the trial court in never clearly defining the proceeding as civil or criminal, but characterizing it as civil until the end of the guilt phase and characterizing it as criminal in the sentencing phase, Mr. Cryan was deprived of any contingent rights. By characterizing it as a civil proceeding in the first half of the trial Mr. Cryan was denied his constitutionally guaranteed criminal rights and by later characterizing it as a criminal or penal sentence which must be imposed the trial court deprived Mr. Cryan of his only defense, that of current compliance. The Supreme Court of Oklahoma in upholding this erroneously stated that Oklahoma follows the concept of sui generis contempts which is a change of law from its prior rulings.

Under the rulings of this Honorable

Court Mr. Cryan was denied his federal constitutional rights and the criminal elements in this statute dominate to make this procedure an unconstitutional one.

Respectfully submitted,

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Attorney for J. G. Cryan,
Petitioner

September, 1981

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA)
) SS:
COUNTY OF CANADIAN)

I, Mark Edgar Hammons, depose and say that I am an attorney in the office of Hammons, Wolking & Hammons, attorney for the record for J. G. Cryan, Petitioner herein, and that on September ____, 1981, pursuant to Rule 33, of the rules of the Supreme Court, I served three copies of the foregoing brief, by mailing the copies in a duly addressed envelope, with First Class postage prepaid, to each of the following named counsel of record:

Mr. Jan Eric Cartwright
Attorney General
Suite 112
Oklahoma City, OK 73105
Attorney for the Respondant

Mr. James E. Poe
740 Grantson Bldg.
Tulsa, OK 74103
Attorney for the Respondant

All parties required to be served have been served.

_____
MARK EDGAR HAMMONS

Subscribed and sworn to before me this __ day of September, 1981.

My commission expires: _____
_____
NOTARY PUBLIC

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

THE BOARD OF GOVERNORS OF THE REGISTERED DENTISTS OF OKLAHOMA, Appellee,	)	
vs.	)	No. 52,579
J. G. CRYAN, d/b/a DENTURIST-DENTURE LAB, Appellant.	)	

Decided April 28, 1981

Appeal from District Court in and for Tulsa County; Ronald N. Ricketts, Trial Judge.

Appeal from District Court, Tulsa County; Ronald N. Ricketts, presiding, from a judgment and sentence for indirect contempt. The contempt sentence was issued for violation of an injunction requiring appellant to cease the unauthorized practice of dentistry. The fine and punishment assessed for contempt under 59 O.S. 1971 §328.49 were the minimum permissible sentence. Contemnor brings this appeal objecting to the existence of criminal attributes of the statutory penalty for contempt provided by the legislature for

unauthorized practice. Affirmed and remanded.

Lawrence D. Taylor, Tulsa, for appellant.

James E. Poe, Tulsa, for appellee.

HARGRAVE, J. This is an appeal from a judgment of indirect contempt and consequent sentence of the minimum permissible fine and jail term provided under the statutory authority of 59 O.S. 1971 §328.49. The judgment of indirect contempt arose from defendant's violation of a permanent injunction charged in a second contempt citation and its amendment, aggregating eleven violations of the previously issued injunction.

Pursuant to the citation, a trial was held with jury waived by the parties upon the plea of not guilty of defendant, J.G. Cryan. The two pivotal evidentiary matters disclosed at the trial, for purposes of this appeal, are the uncontroverted fact that the defendant had violated the previously issued injunction but had not violated the injunction for five months prior to this hearing,

The direct statutory authority on the punishment for indirect contempt of an injunction issued to mandate cessation of the unauthorized practice of dentistry in this jurisdiction in 59 O.S. 1971 §328.49. That statute makes the unauthorized practice of dentistry a misdemeanor, provides punishment therefor, and additionally provides a minimum punishment for contempt of court arising from the violation of an injunction prohibiting unlicensed dental practice of 30 days in the county jail and a fine of not less than $500.00. The court found that the defendant had violated the injunction and imposed the minimum statutory penalty for the contempt.

The appellant's brief notes two propositions of error. First, whether the mandatory minimum punishment provided by the statute is constitutionally permissible when applied to a civil indirect contempt of court. Secondly, the court is alleged to have erred in applying a burden of proof of mere

preponderance of the evidence to the determination of a violation of the injunction.

Appellant asserts in his brief that the burden of proof in a criminal action is reasonable doubt and in a civil action it is asserted to be proof by clear and convincing evidence. The trial court is alleged to have indicated it used a lesser, and impermissible, standard, that being the preponderance of the evidence. This argument will not suffice to establish reversible error under the citation of authority given therefor by the appellant. Clark v. Most Worshipful St. John's Grand Lodge of Ancient Free and Accepted Masons of Oklahoma, 198 Okla. 621, 181 P.2d 229 (1947). That opinion notes the standard of proof necessary to establish a violation of an injunction in a civil contempt proceeding is clear and convincing evidence of violation of the previously issued injunction. Additionally, however, that case makes the point that an incorrect charge to the jury of the burden of

proof to be the lesser standard will not suffice to overturn a judgment of contempt when the evidence of the defendant discloses guilt. In this proceeding there is absolutely no evidence which would support a finding that Mr. Cryan did not violate the injunction, and thus arguments bearing on the standard of proof are superfluous. The defendant's violation is established under any view one can take of the record on appeal.

Secondly, the appellant argues the minimum sentence for past violations does not serve the purpose of coercing present compliance with the injunction, but rather amounts to a mandatory punitive sentence reserved to criminal contempt sentences. Underlying this is the assumption that a civil contempt incarceration must be terminated when the defendant agrees to obey the order previously violated.

Those arguments are generally correct as they relate to contempts at common law, but

in Oklahoma, unlike most jurisdictions, the powers of contempt are provided by express constitutional and statutory provisions as well as their character derived from the historic antecedents of the court's inherent authority to enforce its orders. Thus, constitutional and statutory provisions, in enlarging the scope of the contempt power in Oklahoma, have superseded those common law definitions. Seay v. Howell, 311 P.2d 207 (1957), overruling McKee v. DeGraffenreid, 33 Okla. 136, 124 P. 303, (1912). Inasmuch as the powers of contempt are susceptible to legislative determination through express grant of the Oklahoma Constitution and not solely founded upon the inherent powers of the court in this jurisdiction, proceedings for contempt are denominated sui generis. State ex rel. Young v. Woodson, 519 P.2d 1357 (1974); Fulreader v. State, 408 P.2d 775 (1965). Our Constitution allows the legislature to define contempt. The definition of an indirect contempt is found in

21 O.S. 1971 §565[1] which specifically enumerates willful disobedience of any process or order as an indirect contempt. The Oklahoma Constitution, Article 2, §25[2] provides the legislature shall regulate the proceedings and punishment in matters of contempt. The express language of the article allows a penalty to be imposed upon a jury finding of guilt of violating an order of injunction thusly:

> . . .that any person accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction or restraint, made or entered by any court or judge of the State shall, before penalty is imposed, be entitled to a trial by jury as to guilt or innocence. . . .

It would seem abundantly apparent that

the Oklahoma Constitution contains no prohibition against a punitive sentence in an indirect contempt setting composed of violation of a court's injunction, by virtue of the last quoted provision of the Constitution. The imposition of a penalty for violation or disobedience of an injunction, as authorized by the very language of the Constitution, is hardly consonant with the defendant's claim that the court may only act remedially in an indirect contempt situation. Here, however, the power to impose the penalty is also expressly mandated by the legislature for violation of an injunction designed to stop the unauthorized practice of dentistry under 59 O.S. 1971 §328.49. The sentence is the minimum the court was statutorily empowered to impose in this situation.

The appellant's citations[3] of case law from this Court to the Court of Criminal Appeals dealing with the general nature of contempt and the purposes usually served by a

citation therefor do not impeach the validity of the proceedings here for they are both constitutionally authorized and statutorily mandated. Authority directed to punishment authorized under 12 O.S. §1390 as proper only where non-punitive does not encroach upon the express authority of 59 O.S. 1971 §328.49.

The record designated by appellant is only a fraction of the record of this action in the trial court. The docket sheet contains approximately 105 entries, while the designated record is twenty pages in its entirety. We note the docket sheet shows, inter alia, an additional petition in error over and above the instituting this appeal, and an additional contempt for which jury trial was demanded. Due to the indicia of other proceedings not in the record, we cannot assume the trial judge erred in issuing a judgment which contains aspects of a criminal contempt sentence. The usual indirect contempt situation is issued for violation of an order to a party to complete an

act, such as pay support alimony. There the court is able to issue an attachment which is conditional upon continued failure to comply. The rights of the parties and dignity of the court require no more than incarceration until the party complies. Where the citation results from a failure to cease acts which have been enjoined, such as failure to cease practicing dentistry without a license, a conditional sentence is powerless as an enforcement tool. For, as the appellee here contends, if the punishment for the contempt cannot share any of the attributes of a criminal sentence, it would be entirely impossible to cause the contemnor to be incarcerated at all, because release would be required upon a profession of intent never to violate the injunction. The very presence of the contemnor in court and/or in the anteroom of the incarceration facility would guarantee that he was not at that moment in violation of the injunction. If the court's sentence for contempt could not incarcerate the

contemnor unless he was then in violation there could be no enforcement of the order. Both the Oklahoma Constitution and statutes declare the court has the power to enforce its orders and the historic bases of the powers of contempt arise from the selfsame principle.

The fact that the sentence here statutorily mandated is for a fixed period rather than until the contemnor purges himself is a direct result of the analysis above given and arises from the fact that the procedure and sentence actually undertaken are required to enforce the order. Contempt judgment allowing the defendant here to evade the penalty by repeatedly asserting his assured future compliance would reduce the court's power of enforcement to a mockery.

Here the accused defendant was offered a jury trial and waived it, was represented by counsel, had an opportunity to be heard, and insofar as discernible in this record, raised no issue of possible compliance which requires

a discussion of prejudice occurring by virtue of the degree of proof issue he asserts on appeal. Where the record contains not a scintilla of evidence presenting the trier of fact the issue of compliance, the degree of proof issue is immaterial, for under any view of the evidence the defendant violated the injunction. Under such a record, the propositions of error tendered to not suffice to demonstrate reversible error.

The judgment of the trial court is affirmed and the casue is remanded for further proceedings.

BARNES, V.C.J., HODGES, LAVENDER and DOOLIN, JJ., concur. IRWIN C.J., WILLIAMS, SIMMS and OPALA, JJ., dissent.

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1. §565. Contempts, direct and indirect--definition.

Contempts of court shall be divided into direct and indirect contempt. Direct contempts shall consist of disorderly or

insolent behavior committed during the session of the court and in its immediate view, and presence, and of the unlawful and wilful refusal of any person to be sworn as a witness, and the refusal to answer any legal or proper question; and any breach of the peace, noise or disturbance, so near to it as to interrupt its proceedings, shall be deemed direct contempt of court shall consist of wilful disobedience of any process or order lawfully issued or made by court; resistance wilfully offered by any person to the execution of a lawful order or process of a court.

2. §25. Contempt--Definition--Jury trial--Hearing.

The legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt: Provided, that any person accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction, or

restraint, made or entered by any court or judge of the State shall, before penalty or punishment is imposed, be entitled to a trial by jury as to the guilt or innocence of the accused. In no case shall a penalty or punishment be imposed for contempt, until an opportunity to be heard is given.

3. Those citations are: Davis v. Murphy, 199 Okla. 545, 188 P.2d 229 (1947); Fagin v. Thoroughman, 190 Okla. 649, 126 P.2d 982 (1942); Cannon v. State, 58 Ok. Cr. 451, 55P.2d 135 (1936); In re Hibler, 139 Okla. 1157, 281 P. 144 (1929); Hadley v. State, 139 Okla. 116, 280 P. 1087 (1928); Ex Parte Stephenson, 89 Ok. Cr. 427, 209 P.2d 515 (1949); Kelley v. Kelley, 206 Okla. 188, 242 P.2d 439 (1952); Clark v. Most Worshipful St. John's Grand Lodge of Ancient Free and Accepted Masons of Oklahoma, 198 Okla. 621, 181 P.2d 229 (1947).

SIMMS, J. (dissenting). I must respectfully dissent.

There are times in the law when you

must look beyond the surface. Things are not always what they appear to be.

The portion of statute at issue here does not concern contempt; either civil or criminal, direct or indirect. Its self-description is thus wholly inaccurate as it is actually a criminal statute. It provides a minimum punishment, imprisonment and/or fine, for a prohibited action. Statutes which do that define a public offense, and are by definition criminal, not civil.

Title 21, O.S. 1971, §3, provides:

> "A crime or public offense is an act or omission forbidden by law, and to which is annexed, upon conviction, either of the following punishments:
>
> 1. Death;
> 2. Imprisonment;
> 3. Fine;
> 4. Removal from

office; or,

5. Disqualification to hold and enjoy any office of honor, trust, or profit, under this State."

Legislatures do occasionally set a maximum limit on punishment which may be imposed by a court on a contemnor. (It is of passing interest to note that even that legislative intrusion into the judicial power to punish for contempt has been the subject of much litigation.) The difference between a statutory maximum punishment and a statutory minimum punishment however, is, or should be, obvious.

The majority's confusion stems from its acceptance of the statute being what it says it is. It is not.

It is indeed unusual for a legislature to disguise a criminal statute as something else. It is also unconstitutional. So was the judicial process and procedure to which this

appellant was subjected. It is the substance of things, not mere form, to which courts must look. See generally, Chicago, R.I.&P. Ry. Co. v. Territory, 25 OKL. 238, 105 P. 677 (1909).

The fact that this appellant has been denied due process of law under both the state and federal constitutions, in this "non-prosecution" for this "non-crime" for which there is no defense and for which he must suffer mandatory penal sanctions is so basic it requires no authority. I dissent.

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1. Title 59, O.S. 1971, § 328.49, provides:

> "In addition to any other penalties provided herein, any person found guilty of contempt of court by reason of the violation of any order or judgment of injunction prohibiting the unlicensed practice of

dentistry now in effect or hereafter entered pursuant to any provision of this act, shall be punished by imprisonment in the county jail for a minimum time of not less than thirty (30) days or a maximum of not more than one (1) year and by a fine of not less than Five Hundred Dollars ($500.00). . . ."

Opposition

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No. 81-630

In the Supreme Court of the United States

OCTOBER TERM, 1981

J. G. CRYAN,
Petitioner,

VERSUS

BOARD OF GOVERNORS OF THE REGISTERED DENTISTS OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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December, 1981

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STATEMENT OF THE CASE

On April 30, 1977, a judgment of permanent injunction was issued by the District Court for Tulsa County, State of Oklahoma, against J. G. Cryan in Case No. C-77-621. Said Order permanently enjoined Petitioner from practicing dentistry without a valid and specific license therefore; said Order directed this Petitioner to forthwith cease and desist from practicing dentistry or doing certain specific acts defined as the practice of dentistry. In February of 1978, a Second Application for Citation for Contempt was filed against Petitioner wherein it was alleged that Petitioner had violated the April 30, 1977 Judgment of Permanent Injunction. Trial was scheduled for July 11 and 12, 1978. Trial by jury was waived by Petitioner. Petitioner was

present in person and with counsel. After careful consideration of testimony and evidence the court found the Petitioner in violation of the April 30, 1977 permanent injunction and, pursuant to provisions of 59 O.S. 1971, Sec. 328.49, assessed a $500.00 fine and thirty (30) days imprisonment.

STATEMENT OF THE FACTS

Two witnesses testified on behalf of the Board, Respondent herein, relating to violations of the Permanent Injunction. Petitioner rested without introducing any testimony or evidence. The evidence before the trial court clearly established that the Petitioner was in violation of the Permanent Injunction entered by the court on April 30, 1977. The trial court found the Petitioner guilty of indirect contempt of court.

ARGUMENT AND AUTHORITY

The inherent power of the courts to punish contempt of their authority and to coerce compliance with their orders has clearly been established through legions of cases decided by this Court and lower courts. *Shillitani* v. *U.S.*, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966); *Ex parte Terry*, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (1888). Petitioner argues that the trial court was in error when it determined that the matter before it was a civil indirect contempt. Proposition I of the Petition new before this Court sets forth Petitioner's argument that the contempt in question was criminal indirect contempt and not civil indirect contempt.

The Supreme Court of the State of Oklahoma in its opinion rendered on the 28th day of April, 1981, affirmed the lower court's judgment and stated that an indirect contempt could involve the imposition of a penalty for violation or disobedience of an injunction.

The difference between criminal and civil contempt is in the intended effects of the court's punishment. *United States* v. *Asay,* 614 F.2d 655, 659 (9th Cir., 1980); *United States* v. *Hughey,* 571 F.2d 111, 114 (2d Cir., 1978), citing *Gompers* v. *Buck's Stove & Range Co.,* 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911). Actions and proceedings need not be wholly civil or wholly criminal and the choice of one label does not prevent application of both forms of contempt punishment. For this reason no distinct line can be drawn between civil and criminal contempt. Each shares the other's attributes. The same conduct may result in both civil and criminal contempt charges. *United States* v. *United Mine Workers of America,* 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1946).

Punishment for civil contempt is usually considered to be remedial. The penalty is designed to enforce compliance with the court Order. In the case at Bar the trial court stated in its decision that the enforcement of the State Dental Act, Title 59 O.S. 328.49, through the remedial penal sanction, is to offer protection and enforcement of a statute. The court noted that it has nothing to do with the court's authority or dignity any more than any other civil injunction and that it was remedial in nature. It is clear from the court's Order that the lower court found that the penal sanctions authorized by Section 328.49 were remedial and not meant as a punitive measure to be taken.

It is submitted that the true issue before this Court should be whether or not Petitioner was prejudiced by the determination that the matter would be conducted as a civil indirect contempt. Petitioner was represented by counsel. Counsel was clearly apprised of the nature of the charges against his client. The right for trial by jury was specifically waived by Counsel for the Petitioner. Petitioner had an opportunity to cross-examine Respondent's witnesses and to present a defense but declined to offer any evidence. No mitigation defense was urged other than the fact that the unlawful practice of dentistry had ceased five months prior to the trial. No other attempt for mitigation was offered.

It is submitted that there was no prejudice by the "confusion" as to whether or not this matter should be conducted as a civil indirect contempt or criminal indirect contempt. Petitioner was afforded an adequate opportunity to prepare and present a defense, the right to trial by jury, and the right to be represented by Counsel.

The Petitioner's determination to testify in his own behalf in the latter stage of the bifurcated trial was a decision made with assistance of counsel and therefore not in violation of the Fifth Amendment.

Respondent further wishes to note that in this Court's decision in *Cheff* v. *Schnackenberg, U.S. Circuit Judge, et al.*, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966), this Court affirmed a judgment of contempt wherein a six-month sentence was imposed after a demand for jury trial was made and denied. This Court held that a jury trial was not required in a civil contempt proceeding wherein the im-

prisonment imposed was not in excess of six months and was classified as a "petty offense". That particular case involved the Federal Trade Commission which was seeking a *pendente lite* order and contempt proceedings based upon that order. One of the issues presented in that case was whether or not the contempt proceedings were criminal or civil in nature. The petitioner therein argued that because the contempt proceedings stemmed from an administrative law enforcement action, the proceedings were civil rather than criminal. This Court noted at 348 U.S. 377 that the contention was irrelevant for the reason that a jury trial was not required in a civil contempt proceeding.

Therefore, it is respectfully submitted that the arguments presented in Propositions I and II of the Petitioner's Petition for Writ of Certiorari are irrelevant. It is submitted that upon review of all proceedings, this Court will find that Petitioner was not prejudiced by any confusion he or his attorney may have had as to whether or not the proceedings should be treated as civil or criminal contempt.

It is further submitted that the decision of the Oklahoma Supreme Court is not in conflict with the decision of another State Court of last resort or of a Federal Court of Appeals. The decision below is consistent with this Court's applicable decisions.

CONCLUSION

THEREFORE, premises considered, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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December, 1981

CERTIFICATE OF SERVICE

I, Kay Karen Kennedy, am the Attorney of Record for the Respondent, the Board of Governors of the Registered Dentists of Oklahoma, and that on December ....., 1981, I served three copies of the foregoing brief, by mailing the copies in a duly addressed envelope, with First Class postage prepaid, to the following named counsel of record:

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All parties required to be served have been served.

.....

Kay Karen Kennedy